AR 735-5

(use current version dated 31 January 1998 !)

&

Reports of Survey

(a great help - DA Pam 735-5 dated 1 March 1997 !)

MAJ Kurt Mieth

OIC, Kitzingen Law Center

Building 170, Harvey Barracks

(across street near BOQs & Woodland Inn)

DSN 355-8567 / 8672

PROPERTY ACCOUNTABILITY

Basic Principles

- All Army property, however acquired (even free), must be properly accounted for
- All persons entrusted with Government property are responsible for proper use, care, custody & safekeeping
- Property is accounted as either ***real property*** or ***personal property***

AR 735-5, paras. 2-1 & 2-2

PROPERTY ACCOUNTABILITY

Property Responsibility

- **Command** (includes taking administrative and / or UCMJ actions when necessary)
- **Supervisory**
- **Direct** (obligation for property receipted for)
- **Personal** (obligation for property in possession)

- **Accountable Officer** - Person on orders to maintain formal set of accounting records

AR 735-5, paras. 2-8, 2-10, 13-12

ACCOUNTABLE OFFICERS

- **Transportation Officer** - accountable for property entrusted to him/her for shipment
- **Stock Record Officer** - accountable for supplies held for issue until issued, shipped, &c.
- **Property Book Officer** - accountable for property at using unit level on receipt

Hand receipt holders are not accountable officers !

AR 735-5, para. 13-12

MORE GENERAL PRINCIPLES

- Administrative measures are available to Cdrs to ensure property accountability, they are:
  - designed to protect Government's right to obtain reimbursement for loss due to negligence or misconduct
  - **not** intended as corrective action or punishment
- Cdrs may still take UCMJ or other disciplinary action even if / after survey is done.

AR 735-5, para. 12-1

METHODS OF OBTAINING RELIEF FROM PROPERTY RESPONSIBILITY

- Abandonment Order
- Report of Survey *(DA Form 4697)*
- AR 15-6 Investigation *(DA Form 4697)*
- Cash Collection Voucher / Statement of Charges *(DD Form362)*
- Commander's Memorandum; Inventory Adjustment Report *(DA Form 444);* &c.

AR 735-5, para. 12-1

CASH COLLECTION VOUCHER / STATEMENT OF CHARGES (DD FORM 362)

- All soldiers and DA employees may voluntarily pay for losses *(except when survey or AR 15-6 investigation is mandatory)*
- Amount not to exceed one month's base pay
- This also applies to an individual share's of "joint and several liability"

AR 735-5, para. 12-2

CASH PURCHASE REPLACEMENT

- Voluntary action by person for handtools or organizational clothing and individual equipment (OCIE)
- Purchase must be made from SSSC or CIF *
- Must be made with written authorization of commander or designated representative

* *MAJ Mieth's "Be real… I won't tell" standard of honoring spirit rather than letter of law*

AR 735-5, para. 12-2b

Report of Survey / AR 15-6
***Mandatory* Whenever**

- Suspected negligence or willful misconduct ***and*** individual does not admit liability
- Change in accountable officer (AO) inventory and outgoing AO does not admit liability
- Loss is greater than one month’s base pay
- Loss involves a sensitive item
- Loss involves public funds
- $ 500.^{00} + loss of specific bulk POL

AR 735-5, para. 13-2

What I won't discuss

- Report of Survey (ROS) Approving / Appointing Authorities *(must be LTCs or GS-15s, &c.)*
- How ROS numbers are assigned
- How Appointing authority may decide to:
  - Find "no negligence" and determine "relief from responsibility; or,
  - Find "clear negligence" and use "short survey"
- Why ***you*** got tasked to be the Survey Officer

AR 735-5, Sections III, IV, V, & VI

The Survey Officer

(*AKA* "you poor, suffering $@&*@#!)

- **Must** be SFC or above; or GS-7* or above; or Wage Leader (WL) or Wage Supervisor (WS)

* *this can include LN equivalent within a Civilian Support Center; Grade equivalencies 2LT=GS 7; 1LT=GS 8/9; CPT=GS 10/11 [see AR 640-3, Table 5-2]*

- **Must** *not* have direct interest or personal responsibility for surveyed property
- *Should* be senior to subject(s) of survey, *there are authorized exceptions*

AR 735-5, para. 13-26

Why you and not us?

In addition to doing detailed investigative work, you evaluate the facts in the case, much as a judge or a jury does in a civil court case. You must weigh the evidence and decide whether a person should be held pecuniarily liable. It is a unique role in the Army that you are called on to play. Your ethics must be of the highest caliber. You must make a careful and often time-consuming analysis of all the evidence before you give your opinion.

[“Wait … There’s more”]

Why you and not us?

Why isn't this important and responsible task (which seems to parallel legal procedures in civil life) processed by the Judge Advocate General's Corps? **The Army** has determined that the person charged should be judged by a normal, ordinary person like yourself who can recognize right from wrong. You have common sense and are capable of weighing the facts and arriving at sound, logical recommendations.

FM 10-14-3, *Surveying Officer's* Guide, Question 13

*'Nuff said. Who dares argue with "***The Army***" ?*

The Survey Officer

(*AKA* "you poor, suffering $@&*@#!)

- **Must** begin investigation *immediately* upon notification of appointment
- **Has** 30 calendar days from receipt of survey file to complete survey *(unless given other suspense)*
- **Must** treat duty as Survey Officer as her/his ***primary*** duty until relieved or completed
- **Must** explain *all* delays in *writing* and attach as exhibit to ROS

AR 735-5, paras. 13-27, 13-29

Survey Officer Determinations

- **Determine type of property responsibility** (*i.e.* command, supervisory, direct, personal)
- **Determine "culpability"**
  - Simple negligence? Gross negligence?
  - None? Shared "Joint and several liability" ?
- **Determine whether there is "proximate cause" to hold person liable**
- **Determine type** (damage? Loss of accountability?) **and *actual*** ($ cost) **loss to Government** AR 735-5, paras. 13-30, 13-32

Definitions

- **Simple negligence** - The failure to act as a reasonably prudent person would have under similar circumstances
- **Gross negligence** - An *extreme* departure from a...course of action...expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

AR 735-5, Glossary, Sec. II, Terms

Definitions

- **Willful** misconduct - Any *intentional* wrongful or unlawful act relating to Government property, to include misappropriation of ... property.
- **Proximate Cause** - Cause which, in a *natural and continuous sequence* unbroken by a new cause, produces loss or damage and without which loss...would not have occurred....[the] primary [or] predominating cause...without which [injury] would not have occurred.

AR 735-5, Glossary, Sec. II, Terms

Some Examples

- **Simple negligence:**
  - Failure to do required maintenance checks
  - Leaning weapon on tree while attending to other duties
  - Driving too fast for conditions
  - Failing to maintain proper hand receipts
- **Gross negligence:**
  - Driving 50 kph over limit and intentionally attempting curve without slowing down
  - Leaving matches out where known pyromaniac child has access

Some Examples

- **Willful misconduct:**
  - Driving drunk
  - Misappropriation of government property for personal use
  - Theft
- **Proximate Cause:**
  - Failure to stop at stop sign
  - Allowing / directing untrained or unqualified soldiers to operate equipment (assuming soldiers then damage equipment through lack of skill, etc.)

What if I think <u>there was a crime</u> ?

- **Art. 31(b), UCMJ** requires “rights advice / warnings” be given ***prior*** to interviewing *suspects* about their suspected crimes, such as:
  - Dereliction of duty (Art 92, UCMJ)
  - Failing to secure captured property (Art 103, UCMJ)
  - False official statements (Art 107, UCMJ)
  - Damaging/suffering loss of military property (Art 108, UCMJ)
  - Altering, hiding, destroying public record (Art 134, UCMJ)
- Statements taken in violation of Art. 31(b), UCMJ ***may* still be considered** in determining liability for a ROS

TJAG Opinion, JAGA 1969/3370

Standards in ruling on liability

- Use “Reasonable Person” standard:
  - Does not mean perfection; rather,
  - What would person of normal intelligence have done (*I.e.* Persons w/ 140 IQ get judged at reasonable person w/ 100 IQ standard)
- Consider age, experience, training, “good judgement” as factors in determining liability
  - Judge Signal Officers against what is expected from Signal Officers; trained vehicle drivers v. trained vehicle drivers, etc.
  - Accounting for weather or crowding on MSRs as reflection of judgment

AR 735-5, Appendix C, paras. C-10, C-11

"Pop" Quiz

- Soldier A illegally parks vehicle in "no parking" area. Soldier B backs into A's vehicle. B failed to "clear his rear" or check for obstructions prior to backing.
  - Is A's misconduct (?) proximate cause of damage?
  - Is B's simple negligence (?) proximate cause of damage?

- And now for a few examples from AR 735-5, Appendix C, Para. C-11 and/or DA Pam 735-5, Chapters 7-8… *[Free Soda Pop for correct answers !!!]*

Procedural stuff

- Preference for sworn statements (DA Form 2823)
  - May use phone interviews and “summary MFR”
  - May rely on statements conducted from other investigations (*e.g.* AR 15-6 investigation; MP Report)
- Physically examine items whenever possible & as soon as possible (photos are often useful)
- Collect and mark statements / records as separate exhibits

  AR 735-5, para. 13-29

More Procedural stuff

- Survey Officers relying on “self-serving” statements from persons with property responsibility **must** include explanation of the independent evidence (if available) or other evidence of reliability backs up or corroborates the “self-serving” statement
- Compare “conflicting statements” against other “known facts” included within final ROS
- Determine **actual cost** of Government loss
- “Due Process” afforded for persons “charged” on ROS

AR 735-5, paras. 13-29, 13-30

What is Actual Cost to the Government?

- Are you using Fair Market Value? Or,
- Have you depreciated value of property?

  [Some items (*e.g.* small arms) never are]
- *If* repair increases value of property (compared to time of loss) is credit given for increased value?
- Is credit given for scrap / salvage value?
- Has an damaged item actually resulted in repair costs to the Government?

AR 735-5, Appendix B

How much actually gets charged?

- Up to one month's base pay; *unless-*
- *Personal* Arms or Equipment (pay full amount)

  [You’re often financially better off losing a TOW missile than your M16A2 rifle (w/ attachments)]
- We’re talking “Public funds” (pay full amount) or
- *Accountable Officers* (pay full amount) *Note:* Cdrs do **not** become AOs w/in meaning of AR 735-5 solely because they’re in command - only if *special* relationship was established between them and lost property

AR 735-5, para. 13-42;Table 12-3

TJAG Opinion, DAJA-AL 1980/2722

How much actually gets charged?

- Full amount for Government quarters or furnishings damaged through gross negligence or willful misconduct

  AR 735-5, para. 13-39

- Joint and Several Liability-
  - Proportional division of payment made based on pay grade, not degree of fault
    - If 1LT found 10% responsible for loss and PFC found responsible for remaining 90 %, 1LT still pays more!

AR 735-5, Table 12-4

Respondent's Rights

- Examination of ROS after findings / recommendations have been recorded
  - Respondents allowed 7 calendar days to “submit rebuttal” to hand delivered ROS
  - Respondents allowed 15 calendar days to “submit rebuttal” after receiving “in-country” mailings
  - Respondents allowed 30 calendar days to “submit rebuttal” after receiving “out-of-country” mailings
- Consideration of timely rebuttal statements by Survey Officer prior to “final” findings and recommendation

AR 735-5, paras. 13-40, 13-41

Respondent's Rights

- Obtain legal advice from servicing legal office
- Get translations of exhibits (*e.g.* repair bills)
- To “remain silent” UP Art. 31(b), UCMJ & U.S. Constitution, Amendment V
- Request financial assessments be “prorated” to avoid hardship (*i.e.* ask to “set up an installment plan”)
- Enlisted may request “remission” of *unpaid* debt
- Request reconsideration from Appointing / Approving Authority

AR 735-5, paras. 13-32; 13-33; Appendix C, para. C-3

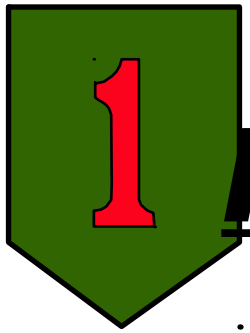
Special Rights For German Employees

(Why it helps to have a strong union)

- Because of NATO SOFA & Supplementary Agreement
  - USAREUR Regulation states German Labor Law decisions apply to German employees subject to ROS
  - Survey Officers still assess liability IAW AR 735-5
- German labor law states “simple negligence” is **insufficient** to hold employees pecuniarily liable
- German labor law allows charges for “middle negligence,” but “no such thing” within AR 735-5, thus German employees avoid payment via this standard
- May also use local “grievance procedures”

I'm a Survey Officer - Who Is My attorney ?

- The good folks (and Great Americans) located at your friendly, neighborhood Kitzingen Law Center, ***but*** *make sure you're not relying on Respondent's Legal Assistance Attorney!*
- Feel free to talk to us before starting ROS; during investigation; before providing ROS to Respondent; before submitting ROS to Appointing Authority; etc.
- In cases where liability is assessed, Appointing Authority must send ROS through our office for legal review (why wait until we see and nit-pick / criticize it then?) *Remember "CYA" is a good thing !*



Remember to CYA*

Call
Your
Attorney!

* *as well as the other meaning*